Office Supreme Court U. S.
FILED.
SEP 29 1887
JAMES. H. McKENNEY.
CLERK.

Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1887—No. 1019.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY,

Appellant,

vs.

CHARLES E. SIMMONS, TRUSTEE, THE FARMERS' LOAN AND TRUST COMPANY, AND FREDERIC TAYLOR, SUCCESSOR TO CHARLES L. FROST, SURVIVING TRUSTEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

Motion to dismiss Appeal, Brief in support thereof, and Notice of Submission.

HERBERT B TURNER,
B. F. LEE,
Of Counsel for Farmers' Loan and Trust Company.

M. B. BROWN, Printer and Stationer, 49 & 51 Park Place, N. Y.

the right to sue out execution for the amount decreed. It conforms strictly to the facts, and the law, correctly found by the Circuit Court. Printed record pages from 8 to 13 inclusive. It is submitted that there is no error whatever in the decree appealed from, and that the same should be wholly affirmed.

W. H. C. ELLIS (of Ellis & Kerr),

Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1887.

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THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY,

Appellant,

vs.

CHARLES E. SIMMONS, Trustee, The FARMERS' LOAN AND TRUST COMPANY, and FREDERIC TAYLOR, successor to CHARLES L. FROST, Surviving Trustee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

FREDERIC TAYLOR, Successor to CHARLES L. FROST, surviving Trustee,

vs.

THE BURLINGTON, CEDAR RAPIDS AND MINNESOTA RAILWAY COMPANY, THE FARMERS' LOAN AND TRUST COMPANY, and other causes consolidated herewith.

IN EQUITY—BILL FOR FORECLOSURE AND SALE.

CHARLES E. SIMMONS, Trustee, Successor to THE FARMERS' LOAN AND TRUST COMPANY, Trustee,

vs.

THE BURLINGTON, CEDAR RAPIDS AND MINNESOTA RAILWAY COMPANY, FREDERICK TAYLOR, Successor to CHARLES L. FROST, Trustee, THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY and THE FARMERS' LOAN AND TRUST COMPANY.

AMENDED AND SUPPLEMENTAL CROSS-BILL.

MOTION TO DISMISS APPEAL.

Now comes The Farmers' Loan and Trust Company, one of the parties to the above-entitled cause, and moves this Honorable Court that the appeal herein be dismissed on the ground that the decree appealed from, dated October 28, 1885, made by the Circuit Court of the United States for the Southern District of Iowa, is not a final decree, and is therefore not appealable to this Court.

HERBERT B. TURNER,
B. F. LEE,
Of Counsel for F. L. & T. Co.

The facts upon which this motion to dismiss is made are set forth in the following brief:

Brief in Support of Motion to Dismiss Appeal made on behalf of The Farmers' Loan and Trust Company, Trustee.

STATEMENT OF FACTS.

The decree appealed from was made and entered in the Circuit Court of the United States for the Southern District of Iowa, on October 28, 1885. It is printed on page 858 of the record. We append a copy. The citation is on page 877.

The litigation out of which the decree arose was begun in 1875.

The facts and circumstances of the litigation are set forth in the petition for appeal at page 863 of the record, with a clearness and brevity that will render it unnecessary to repeat the statement here. We refer the Court to this statement without reprinting it, in order to prevent the needless multiplication of papers. We believe, however, that the following statement will suffice for the understanding of the case.

Generally stated, the facts are these: Prior to the year 1875 The Burlington, Cedar Rapids and Minnesota Railway Company had created certain first mortgages upon its main line, and upon certain extensions thereof, each mortgage being a first lien upon the portion of the road which it affected. It had also created a certain other mortgage known as the "Income and Equipment Mortgage," which purported to be a first mortgage on all the income and equipment of the railway company, there being expressly described in said mortgage two engines and one hundred and thirty box cars, designated by numbers. Said equipment mortgage also purported to be a second lien on all the divisions of said railway.

In or about the year 1875 proceedings were taken to foreclose these several first mortgages. To these bills the trustee of the Income and Equipment Mortgage was made a party defendant. An answer and cross-bill was filed by the trustee of said Income and Equipment Mortgage, it being prayed among other things, that the Court should designate what part of the equipment belonged to the several divisions, and that a specific and first lien on said engines and box cars be decreed in favor of such mortgagee. These several suits were consolidated on October 30, 1875, and on the same day a decree was entered for a foreclosure sale of the premises covered by said several first mortgages (Rec. p. 160). At the time of said foreclosure The Farmers' Loan and Trust Company was the trustee of the Income and Equipment Mortgage, and subsequently Charles E. Simmons became its successor in said trust. As to said Income and Equipment Mortgage said decree in the consolidated causes provided as follows: "And the "claim of the Farmers' Loan and Trust Company, as trus- "tees, in the Income and Equipment Mortgage to any of "the machinery or cars named in their mortgage, is to be "submitted to the Court as soon as counsel can agree on "the facts in vacation or term."

The controversy, which resulted in the decree which is the subject of the present appeal, arose out of the fact that said decree in the consolidated causes does not specifically state that the parties interested in the Income and Equipment Mortgage are barred and foreclosed of their equity of redemption.

In 1876, the said main line and the several divisions of said railway were conveyed by the Master, pursuant to said decree of October 30, 1875, to The Burlington, Cedar Rapids and Northern Railway Company, the present appellant, and that railway company thereupon executed to The Farmers' Loan and Trust Company, as Trustee, a mortgage on its entire line of railway so purchased, to secure bonds to the amount of $6,500,000. It is in its capacity as Trustee of the mortgage or deed of trust so issued by The Burlington, Cedar Rapids and Northern Railway Company that The Farmers' Loan and Trust Company now makes this motion.

On April 13, 1883, Charles E. Simmons, who had then become trustee of the Income and Equipment Mortgage, filed an amended and supplemental cross-bill, averring the defect in the foreclosure decree in the consolidated cause made October 30, 1875, and claiming that thereby the parties interested in the Income and Equipment Mortgage still had a right to redeem the mortgaged premises from the lien of the first mortgage covering the main line (Rec., p. 641).

The main scope of the supplemental cross-bill filed by Simmons is that the decree of October 30, 1875, and the sale under it did not cut off the right of redemption, or affect the said Income and Equipment Mortgage, or the bondholders secured thereby.

A hearing was had in the cause which resulted in an opinion of the Circuit Court, which was filed on May 12, 1885 (Rec. p. 845), which sustained the right of redemption

of the parties interested in the Income and Equipment mortgage. A further opinion was filed by the Court on October 28, 1885 (Rec. p. 853), which stated more minutely the details of the decree to be made. The decree made in pursuance of said opinion, on October 28, 1885, is the decree in question from which the appeal has been taken (Rec., p. 858).

THE NATURE OF THE DECREE.

Our contention is that this decree is nothing more in substance than the usual interlocutory decree, that, according to common practice, is made upon a bill to redeem, as well as upon a bill to foreclose, for the purpose of computing the amount due upon the mortgage, which is the subject of the redemption or the foreclosure, as the case may be.

Let us examine the details of the decree.

The decree appealed from declares upon its face that it is "interlocutory" (Rec., p. 862, last paragraph).

The first paragraph finds that the Income and Equipment Mortgage is a subsisting lien on the main line of the Burlington, Cedar Rapids and Minnesota Railway, and that the equity of redemption of those interested in the mortgage has not been cut off by the proceedings had in 1875 and 1876.

The second paragraph provides "that the defendant, "the Burlington, Cedar Rapids and Northern Railway "Company, is entitled to redeem said main line of rail- "way, property, appurtenances, rolling stock, rights and "franchises from the deed of trust, whereof the said "Charles E. Simmons is trustee, by paying off the amount "due on said deed of trust at such time as shall hereafter "be fixed and determined by a further order or decree to "be entered in this cause."

The third paragraph provides for a redemption by the Income and Equipment bondholders, by paying the amount due on the First Mortgage Main Line Bonds, "as said "amount shall be hereafter determined, within the time "and in the manner in this decree provided." An examination discloses no provision as to time and manner, and as to these, as well as to the amount to be paid, a further decree is necessary.

The fourth paragraph provides that, "In the event that "no redemption shall be made by either of the parties as "hereinbefore provided, then the defendant, the Burling-"ton, Cedar Rapids and Minnesota Railroad Company, "shall be entitled to redeem said main line of railway, "property, appurtenances, rolling stock, rights and fran-"chises by paying off the amount or amounts due on the "deed of trust or deeds of trust against which such re-"demption shall be made, as the same shall be determined "by the further order of the Court herein."

The fifth paragraph provides for a sale of the main line, in a certain event, "under a decree to be entered by this Court."

The sixth paragraph provides for a sale, in another contingency, "pursuant to such decree as may hereafter be "entered herein."

The seventh paragraph provides for a reference to a master "for the purpose of determining the amount neces-"sary to be paid by any of the parties in making redemp-"tion."

The Master is expressly directed to ascertain, (1) What of the Income and Equipment Bonds were issued as collateral for debts of the Burlington, Cedar Rapids and Minnesota Railroad Company, with the present amount of each debt, and the bonds issued in each case as security therefor. The Master is also directed to find and report upon any defenses which have been or may be interposed to any

of said bonds. (2.) Also, to report whether any Income and Equipment bonds so issued as collateral, have been transferred by the holders of the debts. (3.) The Master will further report all Income and Equipment bonds issued and outstanding, and entitled to participate in the decree, and will find and report upon any defenses thereto in whole or in part, together with the amount due thereon. (4.) The Master will report the total amount due on said income and equipment bonds, secured by the said trust deed as aforesaid.

The eighth paragraph of said decree provides for the ascertainment by the Master of the amount necessary to redeem and pay off the first deed of trust, and he is directed to find and report: (1.) The total amount of the debt, principal and interest. (2.) The amount paid since the foreclosure sale for permanent improvements and rolling stock. (3.) The net earnings of said main line of railway stated separately for each year. (4.) What was the reasonable rental occupation for the main line while in possession of the Burlington, Cedar Rapids and Northern Railway Company.

The ninth paragraph of this decree is as follows:

"To aid in determining the amount of net earnings of "said main line above referred to, the said Master will "report separately and yearly."

"(1.) The gross earnings of said main line from local "business.

"(2.) The gross receipts of said main-line from business "coming from branches of the Burlington, Cedar Rapids "and Northern Railway Company, and extended lines "thereof.

"(3.) The amount expended in permanent improvement, "including rolling stock on said main line of railway.

"(4.) The like amount on branches and extensions, "whether made or acquired by construction, purchase, "lease or otherwise.

"(5.) The amount expended in extending branches,

"whether made or acquired by construction, purchase, "lease or otherwise.

"(6.) The amount expended in extending the main line.

"(7.) The net earnings from such branches.

"(8.) The net earnings from extension of the main line.

"(9). All other matters tending to throw light upon the "equities of the first mortgage and parties claiming under "it in the premises."

And the last clause of the decree is:

"*This decree being interlocutory, it is ordered that said "cause stand continued for further order and decree.*"

THE DECREE IS INTERLOCUTORY AND NOT FINAL, ACCORDING TO THE DECISIONS OF THIS COURT.

Parsons vs. *Robinson*, 122 *U. S.*, 112, appears to us to be decisive of this case. In that case the decree appealed from was held not to be a final decree, under the following circumstances:

Proceedings were commenced to foreclose a railroad mortgage, in which the trustee of the mortgage, the railroad company, and others were respondents, and one bondholder originally, and another by intervention, were complainants. A decree was entered that the complainants were entitled to have a sale of the mortgaged property, upon failure of the company to pay an amount to be fixed by reference to a Master within a time to be named by the Court, and an order of reference was made. The Master reported and a decree of foreclosure was entered in which the trustee was directed to sell the mortgaged property, "at such time and place and in such manner as the Court may hereafter determine;" and a reference was ordered to a Master to report the extent and amount of the prior liens on the mortgaged property, full and detailed statements of the

property subject to the lien of said general mortgage, and what liens, if any, are upon the several properties of the railroad company junior to said general mortgage, and the order of their priority.

In *Dainese* vs. *Kendall*, 119 *U. S., pp.* 53, 54, which was a suit brought to enforce a trust deed given to secure certain notes, the Court says :

" The litigation of the parties on the merits of the " case has not been terminated. An account of the rents " collected by Kendall while in possession has not " been taken, and the amounts due Dainese and Kendall, " respectively, on the notes which they severally hold, " have not been ascertained. All this is necessary for the " purposes of the relief asked for in the bill, and the cause " was sent back from the General Term for further pro- " ceedings on that account. The authorities are uniform " to the effect that a decree to be final for the purposes of " an appeal must leave the case in such a condition that if " there be an affirmance here, the Court below will have " nothing to do but to execute the decree it has already " entered."

In *Grant* vs. *Phœnix Ins. Co.* 106 U. S., p. 429, the Court had already held substantially the same doctrine. At the risk of repetition, we quote the language of the Chief Justice in that case :

" The rule is well settled that a decree to be final, " within the meaning of that term, as used in the acts " of Congress giving this Court jurisdiction on " appeal, must terminate the litigation of the " parties on the merits of the case, so that if there " should be an affirmance here, the Court below " would have nothing to do but to execute the decree it " had already rendered. This subject was considered at " the present term in *Bostwick* vs. *Brinkerhoff*, *ante*, p. 3, " where a large number of cases are cited. It has also been " many times decided that a decree of sale in a foreclosure

" suit, which settles all the rights of the parties and leaves " nothing to be done but to make the sale and pay out " the proceeds, is a final decree for the purposes of an " appeal. *Ray* vs. *Law*, 3 Cranch, 179; *Whiting* vs. *Bank* " *of the United States*, 13 Pet. 6; *Bronson* vs. *Railroad Com-* " *pany*, 2 Black, 524; *Green* vs. *Fisk*, 103 U. S. 518. But in " *Railroad Company* vs. *Swasey*, 23 Wall, 405, it was held " that to justify such a sale, without consent, the amount " due upon the debt must be determined . . . . . Until this " is done the rights of the parties are not all settled. " Final process for the collection of money cannot issue " until the amount to be paid or collected by the process, " if not paid, has been adjudged. In this the Court but " followed the principle acted on in *Barnard* vs. *Gibson*, 7 " How., 650; *Crawford* vs. *Points*, 13 *id.*, 11; *Humiston* vs. " *Stainthorp*, 2 Wall, 106; and many other cases."

In *Green* v. *Fisk*, 103 U. S., 518, the plaintiff claimed to be the owner of an undivided half part of certain real estate and he commenced a suit in partition. The Court below decreed that he was entitled to one-half of the property and referred the case to the Master " to proceed " to a partition according to law under the direction of the " Court." This was held not to be a final decree.

It seems to us that in principle the case of *Railroad Company* vs. *Swasey*, 23 Wall, above cited, is decisive of the case at bar.

Humiston vs. *Stainthorp*, 2 Wall., 106, presented the case of the ordinary decree in equity made upon final hearing, on pleadings and proofs, in a suit brought for the infringement of a patent. Such a decree ordinarily determines that the plaintiff has a good and valid patent, and that the defendant has infringed upon the same, thus closing out all the issues relating to the merits of the main controversy. It then proceeds to award a perpetual injunction restraining further infringement, and refers

the cause to a Master to ascertain the unlawful profits that have accrued to the defendant, and, according to the present practice, to assess the plaintiff's damages. Yet in the case cited the Court reiterated the doctrine already announced in *Barnard* vs. *Gibson*, 7 How., 650, that such a decree is not final.

In *Perkins* vs. *Fourniquet*, 6 How., 206, a decree that a community of acquests and gains existed between husband and wife, and ordered an account to be taken, was held not final. The Court says: "This clearly is not a final "decree in any respect. It is the common and ordinary "interlocutory order or decree passed by Courts of Chan- "cery in cases of this kind, and is absolutely necessary to "prepare the case for a final hearing and final decree, "wherever the complainant is entitled to a parti- "tion of property or an account. For the principles "upon which an account is to be stated by the Master, or "a partition made, cannot be prescribed by the Court "until it first determines the rights of the parties by an "interlocutory order or decree; and the case cannot pro- "ceed to final hearing without it. And the appellant is "not injured by denying him an appeal in this stage of "the proceedings, because these interlocutory orders and "decrees remain under the control of the Circuit Court, "and subject to their revision, until the Master's report "comes in and is finally acted upon by the Court, and the "whole of the matters in controversy between the parties "disposed of by a final decree. And upon an appeal from "that decree every matter in dispute will be open to the "parties in this Court, and may all be heard and decided "at the same time."

In *Fourniquet* vs. *Perkins*, 16 How., 84, the same case came before the Court, and it there appears that when the case came on for final hearing, the Court below came to the conclusion that its former decision was erroneous, and it dismissed the plaintiff's bill.

THE APPEAL SHOULD BE DISMISSED.

We submit that the decree appealed from is not a final decree, and the motion to dismiss should be granted.

HERBERT B. TURNER,
B. F. LEE,
Of Counsel.

NOTICE.

You will please to take notice that the foregoing is a copy of the motion to dismiss the appeal in the above-entitled cause and of the brief in support of said motion, and that the foregoing motion will be called up for argument and submitted before the Supreme Court of the United States, at Washington, in the District of Columbia, on the second Monday of October, 1887, at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

HERBERT B. TURNER,
B. F. LEE,
Of counsel for Farmers' Loan and Trust Company.

To THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY (Appellants), and Thomas F. Withrow, Esq., and C. T. Ransom, Esq., its Solicitors and Counsel.

Decree Appealed from.

IN THE CIRCUIT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF IOWA—CENTRAL DIVISION.

ORIGINAL BILL.

FREDERICK TAYLOR, successor to Charles L. Frost, Trustee,
vs.
THE BURLINGTON, CEDAR RAPIDS AND MINNESOTA RAILROAD CO. *et al.*

ALEXANDER TAYLOR, substituted for Henry Clews and P. C. Calhoun, Trustees,
vs.
THE BURLINGTON, CEDAR RAPIDS AND MINNESOTA RAILROAD CO. *et al.*

GEORGE BLISS and FREDERICK BUTTERFIELD, Trustees,
vs.
THE BURLINGTON, CEDAR RAPIDS AND MINNESOTA RAILROAD CO. *et al.*

THE FARMERS' LOAN AND TRUST COMPANY, Trustee,
vs.
THE BURLINGTON, CEDAR RAPIDS AND MINNESOTA RAILROAD CO. *et al.*

CONSOLIDATED CAUSES IN EQUITY—CROSS-BILL.

CHARLES E. SIMMONS, Trustee, successor to the FARMERS' LOAN AND TRUST COMPANY,
vs.
FREDERICK TAYLOR, Trustee, successor to CHARLES L. FROST; THE BURLINGTON, CEDAR RAPIDS AND MINNESOTA RAILROAD COMPANY, THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, and the FARMERS' LOAN AND TRUST COMPANY, Trustee,
Defendants.

Decree.

This cause having been heretofore submitted to the Court as to the amended and substituted cross-bill of Charles E. Simmons, Trustee, complainant herein, upon the pleadings, proofs and exhibits, and upon such submission having been fully argued upon both sides, now on this day of October, 1885, comes on for determination and decree N. M. Hubbard and Charles A. Clark, appearing for Charles E. Simmons, Trustee, complainant in said cross-bill, and Thomas F. Withrow, C. T. Ransom and George J. Boal, Esquires, appearing for the defendants, the Burlington, Cedar Rapids and Northern Railway Company, and the Court having considered the case, and being fully advised, it is ordered, adjudged and decreed as to all of the defendants to the cross-bill of said Charles E. Simmons, trustee, as follows :

First—That the trust deed whereof the said Charles E. Simmons is now trustee, as successor of the Farmers Loan and Trust Company, and described and set forth in and by the cross-bill of the said Simmons, is a valid and subsisting lien upon the main line of railway of the Burlington, Cedar Rapids and Minnesota Railroad Company, together with the property, appurtenances, rolling stock, rights and franchises belonging and pertaining thereto, and described in said cross-bill, and that the right of redemption of the Income and Equipment bondholders, secured by the trust deed whereof the said Charles E. Simmons is now trustee as aforesaid, has not been foreclosed or cut off by the foreclosure of the first trust deed on said line of railway property and franchises, whereof Frederick Taylor, successor to Charles L. Frost, is trustee, nor by the sale thereof, under and by virtue of said foreclosure proceedings.

Second—That the defendant, the Burlington, Cedar Rapids and Northern Railway Company, is entitled to redeem said main line of railway, property, appurtenances, rolling stock, rights and franchises from the deed of trust, whereof the said Charles E. Simmons is trustee, by paying off the amount due on said deed of trust at such time as shall hereafter be fixed and determined by a further order or decree to be entered in this cause.

Third—In the event that said defendant, the Burlington, Cedar Rapids and Northern Railway Company, shall not redeem from the deed of trust, whereof Charles E. Simmons is trustee, as herein provided, then the bondholders secured by said deed of trust represented by Charles E. Simmons, trustee, or a committee appointed by them, or a corporation organized by said bondholders, subject to the approval of the Court and acting for and on behalf of them, shall be entitled to redeem said main line of railway, property, appurtenances, rolling stock, rights and franchises described in said deed of trust and cross-bill, by paying into Court for the proper party in interest to be hereafter determined, the amount due on said first deed of trust, and on the decree and foreclosure proceedings thereunder, as said amount shall be hereafter determined, within the time and in the manner in this decree provided.

Fourth—In the event that no redemption shall be made by either of the parties as hereinbefore provided, then the defendant, the Burlington, Cedar Rapids and Minnesota Railroad Company shall be entitled to redeem said main line of railway, property, appurtenances, rolling stock, rights and franchises by paying off the amount or amounts due on the deed of trust or deeds of trust against which such redemption shall be made, as the same shall be determined by the further order of the Court herein.

Fifth—In the event that neither the Burlington, Cedar Rapids and Northern Railway Company nor the Burlington, Cedar Rapids and Minnesota Railroad Company shall redeem from the deed of trust, represented by Charles E. Simmons, trustee, and thereupon the Income and Equipment bondholders, represented by the said Charles E. Simmons, trustee, shall exercise their right of redemption from the first deed of trust, represented by Frederick Taylor, trustee, as herein provided, then and in that event, the trust deed represented by the said Charles E. Simmons, trustee, and set forth in his cross-bill herein, shall be foreclosed, and a sale of said main line of railway, property, appurtenances, rolling stock, rights and franchises, described in said deed of trust and said cross-bill shall be had under a decree to be entered by this court, and the proceeds of such sale shall be applied to paying off the amount paid to redeem from said first trust deed, and the amount found

to be due upon the trust deed represented by Charles E. Simmons, and the balance of proceeds arising from such sale shall be paid to the Burlington, Cedar Rapids and Northern Railway Company, and from and after such sale, the equity of redemption of all of the defendants herein will be forever barred, foreclosed and cut off.

But until such sale and foreclosure thereby, or until redemption by the mortgagor, the Burlington, Cedar Rapids and Minnesota Railway Company, the possession of said main line of railway, its rolling stock, equipment and all appurtenances is not to be disturbed, but is to remain as it now is with the defendant, the Burlington, Cedar Rapids and Northern Railway Company.

Sixth—In the event none of these parties shall redeem from the others, as hereinbefore provided, then a sale of said main line of railway, property, appurtenances, rolling stock, rights and franchises shall be had pursuant to such decree as may hereafter be entered herein, and from the proceeds of such sale shall be paid off.

First—To the Burlington, Cedar Rapids and Northern Railway Company the amount which it may hereafter be determined is due upon the first deed of trust represented by Frederick Taylor, trustee.

Second—To Charles E. Simmons, Trustee, the amount which it may hereafter be determined is due upon the second deed of trust, represented by Charles E. Simmons, trustee, and the amount of proceeds, if any remaining after the amounts due on said trust deed shall be paid off, shall be paid over to the Burlington, Cedar Rapids and Northern Railway Company.

Seventh—For the purpose of determining the amount necessary to be paid by any of the parties in making redemption as herein provided, this cause is referred to P. T. Lomax, Esq., one of the Masters in Chancery of this Court, who, as to the deed of trust represented by Charles E. Simmons, trustee, shall find and report as follows:

(1.) What of the Income and Equipment bonds, so called, secured by said deed of trust, were issued as collateral for debts of the Burlington, Cedar Rapids and Minnesota Railroad Company, with the present amount of each debt, and the bonds issued in each case, as

security therefor, and the Master will also find and report upon any defenses which have been or may be interposed to any of said bonds.

(2.) Said Master will report whether any of said Income and Equipment bonds found by him to have been issued as collateral for the debts of said railroad company have been transferred by the holders of such debts, and if so, under what circumstances, and for what consideration, and what were the number of the bonds transferred in each case.

(3.) Said master will further report all income and equipment bonds issued and outstanding, and entitled to participate under this decree, and will find and report upon any defenses thereto in whole or in part, together with the amount due thereon, including interest, and all holders of such bonds may come in and file the same, and have them included in the report of said Master, subject to such terms and conditions as the Court may hereafter impose as to bondholders who may hereafter come in and avail themselves of this provision.

(4.) Said Master will report the total amount due on said Income and Equipment bonds secured by the said trust deed, upon the basis aforesaid.

Eighth—The said Master will also ascertain and report the amount necessary to redeem and pay off the first deed of trust, represented by Frederick Taylor, trustee, and on the foreclosure proceedings under said deed of trust, and in determining such amount, he will find and report:

(1.) The total amount of debt secured by said first trust deed, principal and semi-annual interest stated separately.

(2.) The amount paid since the foreclosure proceedings and sale under said first trust deed for permanent improvements on said main line of railway property and rolling stock appurtenant thereto.

(3.) The net earnings of said main line of railway stated separately for each year.

(4.) What was the reasonable rental occupation for said main line of said railway during the period of its possession by said Burlington, Cedar Rapids and Northern Railway Company?

Ninth—To aid in determining the amount of net earnings of said main line, above referred, the said Master will report separately and yearly:

(1.) The gross earnings of said main line from local business.

(2.) The gross receipts of said main line from business coming from branches of the Burlington, Cedar Rapids and Northern Railway Company, and extended lines thereof.

(3.) The amount expended in permanent improvements, including rolling stock, on said main line of railway.

(4.) The like amount on branches and extensions, whether made or acquired by construction, purchase, lease or otherwise.

(5.) The amount expended in extending branches, whether made or acquired by construction, purchase, lease or otherwise.

(6.) The amount expended in extending the main line.

(7.) The net earnings from such branches.

(8.) The net earnings from extension of the main line.

(9.) All other matters tending to throw light upon the equities of the first mortgage, and parties claiming under it in the premises.

This decree being interlocutory, it is ordered that said cause stand continued for further order and decree.

Supreme Court of the United States.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, Appellant,

vs.

CHARLES E. SIMMONS, Trustee, THE FARMERS' LOAN AND TRUST COMPANY and FREDERIC TAYLOR, successor to Charles L. Frost, Surviving Trustee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

FREDERIC TAYLOR, successor to Charles L. Frost, Surviving Trustee,

vs.

THE BURLINGTON, CEDAR RAPIDS AND MINNESOTA RAILWAY COMPANY, THE FARMERS' LOAN AND TRUST COMPANY, and other causes consolidated herewith.

IN EQUITY. BILL FOR FORECLOSURE AND SALE.

CHARLES E. SIMMONS, Trustee, successor to the Farmers' Loan and Trust Company, Trustee,

vs.

THE BURLINGTON, CEDAR RAPIDS AND MINNESOTA RAILWAY COMPANY, FREDERIC TAYLOR, successor to Charles L. Frost, Trustee; THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY, and THE FARMERS' LOAN AND TRUST COMPANY.

AMENDED AND SUPPLEMENTAL CROSS-BILL.

Now comes The Farmers' Loan and Trust Company, one of the parties to the above entitled cause, and

moves this Honorable Court that the appeal herein be dismissed on the ground that the decree appealed from, dated October 28, 1885, made by the Circuit Court of the United States for the Southern District of Iowa, is not a final decree and is therefore not appealable to this Court.

HERBERT B. TURNER,
B. F. LEE,
Of Counsel for F. L. and T. Co.

To

The Burlington, Cedar Rapids and Northern Railway Company, and Thomas F. Withrow, Esq., and C. T. Ransom, Esq., its solicitors and counsel:

Charles E. Simmons, Trustee, and N. M. Hubbard, Esq., and Charles A. Clark, Esq., solicitors, and of counsel for said Charles E. Simmons, and Frederic Taylor, successor of Charles L. Frost, Surviving Trustee:

You will please to take notice that the foregoing motion will be called up for argument before the Supreme Court of the United States, at Washington, in the District of Columbia, on the second Monday of October, 1887, at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

HERBERT B. TURNER,
B. F. LEE,
Of Counsel for F. L. and T. Co.

We hereby admit due service upon us of a copy of the foregoing motion and of the foregoing notice of the argument thereof.

123-52

Office Supreme Court U. S.
FILED.
OCT 8 1887
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1887.

No. 1019.

THE BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY,
Appellant,

vs.

CHARLES E. SIMMONS, Trustee, THE FARMERS LOAN AND TRUST COMPANY, and FREDERICK TAYLOR, Successor to CHARLES L. FROST, Surviving Trustee,
Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Iowa—Central Division.

APPELLANT'S BRIEF

ON THE MOTION OF APPELLEE, THE FARMER'S LOAN AND TRUST COMPANY, TO DISMISS APPEAL.

THOS. F. WITHROW,
FOR THE APPELLANT.

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Appeal from the Circuit Court of the United States for the Southern District of Iowa—Central Division.

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ON THE MOTION OF APPELLEE, THE FARMER'S LOAN AND TRUST COMPANY, TO DISMISS APPEAL.

The appeal was taken in this case for the reason that a difference of opinion has been expressed in the court below as to the character of the decree. There is apparent warrant for this difference in the decisions of the courts. For example: This court held, in *The National Bank* v. *Shedd*, 121 U. S. Rep., 74, that the decree appealed from in that case, which ordered a sale of mortgaged property "before the rights of the "parties under the several mortgages had been fully ascer-"tained and determined," was a final decree, from which an appeal could be taken. In the later case of *Parsons* v. *Robinson*, 122 U. S. Rep., 112, the decree was held to be interloc-